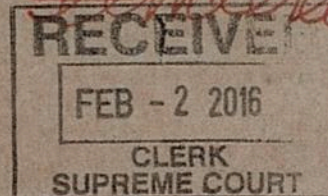


COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
CASE NO. 2015-SC-000144-D



MARY E. MCCANN, INDIVIDUALLY and ON  
BEHALF OF ALL OTHERS SIMILARLY SITUATED

APPELLANT

v. APPEAL FROM THE COURT OF APPEALS  
CASE NO. 2014-CA-00392  
JEFFERSON CIRCUIT COURT CASE NO. 10-CI-01130

THE SULLIVAN UNIVERSITY SYSTEM, INC.  
d/b/a SULLIVAN UNIVERSITY COLLEGE OF  
PHARMACY et al.

APPELLEES

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BRIEF OF *AMICUS CURIAE*  
KENTUCKY CHAMBER OF COMMERCE AND KENTUCKY SOCIETY FOR  
HUMAN RESOURCES MANAGEMENT

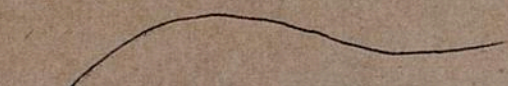
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CERTIFICATE REQUIRED BY CR 76.12(6)

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## **I. INTRODUCTION**

The purpose of this *amicus curiae* brief filed on behalf of both the Kentucky Chamber of Commerce (the “Chamber”) and the Kentucky Society for Human Resources Management (“KYSHRM”) is to assist the Court in reaching the conclusion that class actions brought under the Kentucky Wages and Hours Act (the “Kentucky Act”) are prohibited. While this *amicus curiae* brief will advance many arguments, both legal and practical, for why that is the case, the most basic and ultimately dispositive argument is grounded in the simple text of the Kentucky Act, which provides:

Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves.

KRS 337.385(2).

This language is plain, clear and unambiguous, and, most importantly, provides a statutory remedy permitting individuals to join their claims in one proceeding, although not in any representative capacity. For these and the other reasons outlined herein, the Chamber and KYSHRM urge the Court to conclude that class actions may not proceed under the Kentucky Act.

## **II. ARGUMENT**

### **A. The Plain Language Of KRS 337.385(2) Provides A Clear Expression Of Intent That Class Actions Are Not Permitted.**

The Chamber and KYSHRM agree that Kentucky litigants generally have a right to bring class actions claims. But this right is not absolute. When a statute prohibits a class action, class relief may not be sought in a claim brought under that statute. The Kentucky General Assembly expressed the clear intent to prohibit class actions in claims under the Kentucky Act in KRS 337.385(2):

Any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable . . . . Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees **for and in behalf of himself, herself, or themselves.**

(emphasis added).

This language sets forth an express limitation on how claims under the Kentucky Act may be brought -- it permits individuals to join their claims in one proceeding, but not in a representative capacity. Rather, an employee or employees may sue only “for and in behalf of himself, herself or themselves.” To read the statute in any other manner would be a departure from nearly a century’s worth of precedent in the Commonwealth holding that phrases and sentences in statutes are to be construed according to the rules of grammar. *Gilbert v. Greene*, 185 Ky. 817 (Ky. 1919).

Grammatically speaking, the pronouns “himself,” “herself,” and “themselves” are reflexive pronouns. Reflexive pronouns **always** refer to, and are identical with, the subject of the sentence or clause. Elaine P. Maimon et al., *The New McGraw-Hill Handbook*, 537 (2007). Here, the subject is the “one (1) or more employees” who are maintaining an action in court. The pronouns “himself,” “herself,” and “themselves” refer to the “one (1) or more employees” who are maintaining such an action. The correct grammatical reading of the passage is:

- (i) any one employee may maintain an action for and in behalf **of himself**;
- (ii) any one employee may maintain an action for and in behalf **of herself**; and
- (iii) any two or more employees may maintain an action for and in behalf **of themselves.**

None of these three readings supports a conclusion that employees may sue for and in behalf of anyone **else**, that is, for and in behalf of anyone who has not also

commenced an “action” to assert his or her own rights under KRS 337.385(2).<sup>1</sup> Obviously, more than one person may bring a cause of action under KRS 337.385(2) in the same case, but they may not do so in a **representative** capacity.

Even the most liberal construction of the language cannot yield a different conclusion, and that fact alone is case dispositive. Not surprisingly, we are aware of no Kentucky case that has reached a different result.

**B. A Review Of The Legislative History Of KRS Chapter 337 Reveals That The Literal Reading Of The Statute Is Correct.**

A review of other sources settles any doubt that the literal reading of KRS 337.385(2) is the correct one. The language of KRS 337.385(2) was modeled on the language in the Kentucky Act’s federal counterpart, the Fair Labor Standards Act (“FLSA”), but conspicuously does not include the five words from the FLSA that would have conferred the ability to advance a representative action:

KRS 337.385(2) (Kentucky Wages & Hours Act):

Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves.

29 U.S.C. § 216(b) (FLSA):

An action may be maintained against an employer . . . by any one or more employees for and in behalf of himself or themselves *and other employees similarly situated*.

(emphasis and italics added). Thus, the FLSA permits a representative action by allowing an individual to bring a claim on behalf of another similarly situated; the Kentucky Act

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<sup>1</sup> While the presence of reflexive pronouns is determinative, it is also interesting to note the statute uses “in behalf of” rather than “on behalf of.” “On behalf of” connotes representative action, but “in behalf of” does not. As the late Professor John B. Bremmer has explained, “[t]he terms *in behalf of* and *on behalf of* are not interchangeable. *In behalf of* means ‘for the benefit of, for the sake of, in the interest of’ . . . . *On behalf of* means ‘as the agent of, on the part of, in the place of’ . . . .” John B. Bremmer, *Words on Words: A Dictionary for Writers and Others Who Care About Words* 62 (1980).

This language clearly permits a class action (but, again, not a collective action, as there is no “opt in” language as is present in the FLSA). If the General Assembly had intended to permit class actions for wage and hour violations, it could have simply repeated the five critical words it included as part of KRS 337.427, which it enacted **eight years earlier**. The General Assembly was clearly aware of the phrase “and other employees similarly situated,” yet omitted it from KRS 337.385(2), despite its inclusion in both KRS 337.427 and the remedial provisions of the FLSA. The only manner to properly read KRS 337.385(2) -- when viewed in light of KRS 337.427 -- is that it does not permit representative actions.

**D. This Court Has Consistently Recognized And Rendered Decisions Based On Slight Textual Differences In Similar Statutes.**

When two similar statutes have distinct language, this Court has consistently honored those differences, regardless of the substantive outcome at issue. For instance, in *Kentucky Dep't of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003), this Court considered two different provisions of the Kentucky Civil Rights Act.<sup>3</sup> At issue was the availability of punitive damages, specified in one provision but not the other:

KRS 344.450 (Kentucky Civil Rights Act – Employment Discrimination):

In the employment discrimination context, permitting recovery for “actual damages sustained.”

KRS 344.660 and KRS 344.665 (Kentucky Civil Rights Act – Housing Discrimination):

In the housing discrimination context, permitting recovery for “punitive damages.”

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<sup>3</sup> Just as the Kentucky Act is modeled after the FLSA, the Kentucky Civil Rights Act is modeled after Title VII of the federal Civil Rights Act.

When faced with this obvious disparity in language, this Court rejected the Court of Appeals’ “policy-orientated approach,” which allowed for recovery of punitive damages under KRS 344.450. *Id.* at 139. Instead, it reversed and found, *inter alia*, that “in construing statutes it must be presumed that the Legislature intended something by what it attempted to do.” (emphasis in original). *Id.* at 140. The General Assembly only intended to permit recovery for “actual damages sustained” for instances of employment discrimination because its inclusion of punitive damages in the housing discrimination provision clearly showed it knew the difference between the types of damages. *Id.*

Similarly, to conclude KRS 337.385(2) permits a class action, this Court would have to read into the statute that which simply is not there. *McCullough* rejects such a “policy-orientated approach,” and this Court should do the same.<sup>4</sup>

The result in *McCullough* should not be surprising; it is grounded in the common sense notion that when closely related statutes say different things, the General Assembly intended different results. Nowhere is this more evident than in the recent case of *Griffin v. Rice*, 381 S.W.3d 198 (Ky. 2012). In that case, the court was tasked with deciding who would receive the deceased’s estate, his mother or his wife. The answer turned on this Court’s interpretation of KRS 392.090(2), which provided that a spouse who voluntarily leaves the other and “lives in adultery” forfeits his or her right to an interest in the other’s estate of property. The proof at trial showed that the deceased’s wife engaged in one act of sexual intercourse with another man, which happened to be the night prior to the deceased’s death. *Id.* at 199.

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<sup>4</sup> Unfortunately, for years, many businesses were subjected to punitive damages, when the language of KRS 344.450 clearly did not permit such damages. With respect to both KRS 344.450 and the Kentucky Act, it took far too long for defense counsel to raise the argument that the statutory language limited potential plaintiffs.

In concluding that the phrase “lives in adultery” requires proof of more than one sexual act, this Court noted Kentucky’s former fault-based divorce statute contained different phrasing depending upon the party seeking the divorce. According to the prior statute -- which while concededly dated and sexist is nevertheless instructive for this limited purpose -- a husband or a wife could obtain a divorce on the grounds that the other was “living in adultery with another man or woman,” but, according to another provision, a husband could also obtain a divorce on the grounds of “adultery by the wife.” *Id.* at 202. In finding for the wife, *Griffin* focused on the difference in language and stated:

Had the General Assembly considered one instance of adultery sufficient to bar a husband or wife from his or her interest in the other spouse’s estate and property, it would have made this clear by employing different wording in the statute, such as “commits adultery” or “engages in adultery.” Another statute, in effect at the same time as the statute at issue, indicates the General Assembly was aware of the import of its phrasing and knew exactly how to distinguish between one adulterous act and multiple acts of adultery. . . . The language chosen by the General Assembly in the contemporaneous divorce statute makes clear the legislature was aware of the significance of its phrasing and was able, had it meant to do so, to employ language that indicated one act of adultery would be sufficient to bar a husband or wife from his or her interest in the other spouse’s estate and property.

*Id.* at 202-03.

Taken together, *McCullough* and *Griffin* stand for the proposition that different word choices in closely related statutes must be given effect. The General Assembly understands the import of even slight word changes, and the Supreme Court has read those words literally, regardless of the outcome. In *Griffin*, that approach arguably had real and negative consequences -- rewarding the unfaithful wife at the expense of the deceased’s mother.

By contrast, there are no such negative consequences to the General Assembly's choice to omit the critical and dispositive phrase "and other employees similarly situated." Any individual who wants to pursue a claim under the Kentucky Act against an employer will be able to do so, regardless of the Court's ruling. But to the extent that result is insufficient for the one possibly affected group -- the plaintiffs' bar -- the potential remedy is via the legislative process.

**E. If The General Assembly Wishes To Allow For Class Actions, It Will Amend The Statute**

In *City of Somerset v. Bell*, 156 S.W.3d 321 (Ky. App. 2005), the Court of Appeals cited a line of precedent spanning more than 70 years which interpreted KRS 134.590(6) and its predecessor statute as not allowing for class relief because it provided "[n]o refund shall be made unless application is made *in each case* within two (2) years from the date payment was made." (emphasis in original).<sup>5</sup> However, the General Assembly had amended the statute in 1996 to delete the words "in each case," which allowed the plaintiff taxpayers to argue the statute now permitted class actions. *City of Somerset*, 156 S.W.3d at 326. The Court of Appeals agreed and held:

Considering the historical significance of that phrase [in each case], beginning in the *Swiss Oil* case, we must conclude that the intent of the legislature was to amend that portion of the statute limiting refunds for ad valorem taxes to individual claims. Even if the change was unintentional, its effect was to alter key language of a statute, which, for some seventy years before the amendment, had been interpreted by the courts to limit tax refunds to individual claims.

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<sup>5</sup> *Swiss Oil Corp. v. Shanks*, 208 Ky. 64, 270 S.W. 478 (Ky. 1925); *Bd. of Educ. of Fayette County v. Taulbee*, 706 S.W.2d 827 (Ky. 1986); *Bischoff v. City of Newport*, 733 S.W.2d 762 (Ky. App. 1987).

*Id.* at 326-27.<sup>6</sup> For over 70 years, Kentucky courts held class relief was unavailable based on the General Assembly's use of the words "in each case" in KRS 134.590(6). The Court of Appeals authorized a class action based solely on the removal of that phrase from the revised 1996 statute.

Then, in 2005, the General Assembly -- disagreeing with the holding of *City of Somerset* -- amended KRS 134.590(6) to negate class relief by providing "[n]o refund shall be made unless **each taxpayer individually** applies . . . ." (emphasis added). This case is illustrative of how the Courts dutifully read the statutory language in its historical context, and the General Assembly exercised its prerogative to amend the statute. Likewise, if the General Assembly wishes to allow class relief in a wage and hour case, it can simply amend the language of KRS 337.385(2) to effectuate that intent.

**F. Legislators and Courts Have Long Expressed Concerns with the Class Action Process.**

Given the potential for abuse in the class action mechanism, it is not surprising that legislatures and the courts have expressed significant concerns regarding abuse. Several of these concerns were highlighted in the U.S. Senate Judiciary Committee Report addressing the Class Action Fairness Act of 2005.

To this point, the Report noted because the class lawyers are the individuals who bring the lawsuits, they effectively control the litigation. As such, the clients, the purportedly injured class members, typically are not consulted about what they wish to achieve in the litigation and how they wish it to proceed -- "[i]n short, the clients are marginally relevant at best." S. Rep. No. 109-14, p. 4 (2005). In fact, as originally envisioned, class action lawsuits were to be primarily a tool for civil rights litigants

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<sup>6</sup> So, too, should this Court conclude that KRS 337.385(2) does not allow for class relief given the historical significance of the "and other employees similarly situated" language.

seeking injunctions in discrimination cases.” *Id.* at 7. It goes without saying that class action abuses demonstrate a far different system than the one originally envisioned.

One reason for the dramatic explosion of class actions in state courts is that some circuit court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions. *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996). In Kentucky, in fact, since the adoption of CR 23.06 on January 1, 2011, the Court of Appeals has reversed, in full or in part, the class certification decision of the lower court on four separate occasions.<sup>7</sup>

Another unfortunate consequence of class actions is potential for class counsel to seek their own pecuniary interests to the detriment of the members of the class. *See Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (“[C]lass counsel, ungoverned as a practical matter by either the named plaintiffs or the other members of the class, have an opportunity to maximize their attorney’s fees which...are all they can get from the class action—at the expense of the class”); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (“Settlement classes create especially lucrative opportunities for putative class attorneys to generate fees for themselves without any effective monitoring by class members who have not yet been apprised of the pendency of the action”); *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011) (“We and other courts have often remarked [on] the incentive of class counsel, in complicity with the defendant’s counsel, to sell out the class by agreeing with the

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<sup>7</sup> *See Merck & Co., Inc. v. Ratliff*, No. 2011-CA-000234-MR, 2012 WL 413522 (Ky. App. Feb. 10, 2012); *Childers Oil Co. v. Reynolds, et al*, No. 2011-CA-001352-ME, 2012 WL 1900135 (Ky. App. May 25, 2012); *Toyota Motor Mfg., Ky, Inc. v. Kelley*, No. 2012-CA-001508-ME, 2013 WL 6046079 (Ky. App. Nov. 15, 2013); *Hughes v. UPS Supply Chain Solutions, Inc.*, Nos. 2012-CA-001353-ME, 2013 WL 4779746 (Ky. App. Sept. 6, 2013).

defendant to recommend that the judge approve a settlement involving meager recovery for the class but generous compensation for the lawyers....”).

But perhaps the greatest danger of class actions, particularly in the wage and hour context, is the pressure that can be placed on a defendant to settle a case. This fear has consistently been recognized by various courts. *See, e.g., Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (“a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiffs’ probability of success on the merits is slight”). *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (“certification of a class action, even one lacking merit, forces defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability. . . . [Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.” *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (“the risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. . . . These settlements have been referred to as judicial blackmail).”

Imagine the pressure the average member of the Chamber (267 employees) in Kentucky would be under to settle a class action complaint under the Kentucky Act alleging a significant wage and hour violation. While some employers may have the resources to litigate these claims for many years, the number of Chamber members with such resources would be few and far between.<sup>8</sup> If such a claim were brought under federal law, at least the business could be comforted by the fact that liability would be

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<sup>8</sup> For example, in *Toyota Motor Mfg., Ky, Inc. v. Kelley*, No. 2012-CA-001508-ME, 2013 WL 6046079 (Ky. App. Nov. 15, 2013), the Complaint was originally filed in 1999. But Toyota is obviously worlds apart from the vast majority of Chamber members in terms of financial and legal resources. The pressure for the average Chamber member to eventually settle such a claim would be immense.

somewhat limited by the two-year (three years if a willful act) statute for FLSA violations (as opposed to five years under the Kentucky Act) as well as by the fact that the “opt in” collective action mechanism could significantly limit the number of individuals who would seek recovery. Without such limits to recovery, many small businesses could “go under” if faced with a class action complaint. Presumably, the drafters of the 1974 Kentucky Act understood these issues and selectively chose from the FLSA accordingly. (Of course, even if they did not, it is completely irrelevant, as the Kentucky Act unambiguously says what it says).<sup>9</sup>

**G. The Kentucky Labor Cabinet’s Authority Provided By KRS 337.385(4) Eliminates Any Argument That Class Actions Are Needed to Permit Recovery for Individuals Allegedly Aggrieved Under The Kentucky Act**

One potential counter to the above points is concern that a sole individual allegedly aggrieved under the Kentucky Act will not be able to pursue wage and hour claims because the amounts at issue are so minimal nature. Fortunately, the drafters of KRS 337.385 took this issue into account as well, as the Kentucky Act provides a mechanism for enforcement by the Kentucky Labor Cabinet. KRS 337.385(4) provides:

At the written request of any employee paid less than that amount to which he or she is entitled under the provisions of KRS 337.020 to 337.285, the commissioner may take an assignment of such wage claim in trust for the assigning employee bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney’s fees as may be allowed by the court. The commissioner in case of suit shall have power to joint various claimants against the same employer in one (1) action.

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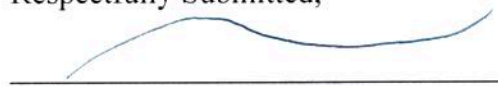
<sup>9</sup> Given the ease with which small, inadvertent errors can be made in compensating individual employees for time worked, it is understandable why the Kentucky General Assembly would have crafted KRS 337 to exclude the option of class litigation against Kentucky employers for unpaid wages, and that is just what the General Assembly did when it passed KRS 337.

It is difficult to see how an aggrieved individual could fare better even if class actions were permitted under the Kentucky Act.<sup>10</sup> For any claim, no matter how small, the Labor Cabinet may investigate and proceed on the behalf of a single individual. Moreover, it could also join various claimants against the same employer in one action. If an individual wished to not avail himself or herself of the *free* services of the Labor Cabinet, the individual could presumably convince an attorney to take a case where the potential damages were anything above nominal. And to the extent other employees under the same employer allegedly suffered violations, they could join suit in one “mass action.” KRS 337.385(2) only prohibits representative class actions; it does not purport to put any limitations on any number of individuals who wish to affirmatively state a claim against their employer.<sup>11</sup> Anyone who wants to participate in a case may do so.

### **III. CONCLUSION**

For the foregoing reasons, the opinion of the Court of Appeals should be affirmed, and this Court should definitively conclude that class actions are not permitted under the Kentucky Act.

Respectfully Submitted,



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<sup>10</sup> In fact, until 2005, plaintiffs had to exhaust their administrative remedies in wage and hour cases before proceeding to court. *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354 (Ky. 2005).

<sup>11</sup> In this regard, there are similarities to a collective action under the FLSA, in that an aggrieved individual must take an affirmative step to potentially recover.